

1AE5curA

argument

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 PAMELA CURLEY, *et al.*,

4 Plaintiffs,

5 v.

10 Civ. 5240 (WHP)

6 ASTELLAS US LLC, *et al.*,

7 Defendants.

8 -----x

9 October 14, 2011
12:07 p.m.

10 Before:

11 HON. WILLIAM H. PAULEY III,

12 District Judge

13 APPEARANCES

14 DICHARA LAW FIRM, LLC
Attorneys for Plaintiffs
15 BY: MICHAEL R. DICHARA

16 MORGAN, LEWIS & BOCKIUS, LLP
Attorneys for Defendants
17 BY: JOSEPH A. NUCCIO
RICHARD G. ROSENBLATT

1AE5curA

argument

1 (Case called)

2 MR. DiCHIARA: Michael DiChiara, Joseph & Herzfeld.

3 THE DEPUTY CLERK: Appearances for the plaintiff.

4 MR. DiCHIARA: Good afternoon, your Honor. Michael
5 DiChiara on behalf of the plaintiff.

6 THE COURT: Good afternoon, Mr. DiChiara.

7 THE DEPUTY CLERK: Appearance for the defendant?

8 MR. ROSENBLATT: And Richard Rosenblatt and Joseph
9 Nuccio for defendant.

10 THE COURT: Good afternoon, Mr. Rosenblatt.

11 MR. ROSENBLATT: Good afternoon, your Honor.

12 THE COURT: This is all argument on the plaintiff's
13 motion. Do you want to be heard?

14 MR. DiCHIARA: Yes, Judge. Is it okay if I use the
15 podium, Judge?

16 THE COURT: Yes.

17 MR. DiCHIARA: Good afternoon, Judge. As you know,
18 the standard for 216(b) motion is that the plaintiff just needs
19 to make a modest factual showing and if you put aside
20 everything that plaintiffs have submitted in this case and just
21 rely on defendant's submissions, you have enough to establish
22 that the modest factual showing, that 216(b) notice should
23 issue here.

24 First we have defendant's initial consent to notice
25 going out in the Florida action back in December. Again, we

1AE5curA

argument

1 have defendant's job descriptions which are similar across
2 therapeutic areas, regions of the country and type of rep.
3 They're all almost essentially identical. And then you have
4 defendant's declarations which they submitted, I believe it was
5 about 14, where they all --

6 THE COURT: Does Astellas have a nationwide job
7 description for sales reps?

8 MR. DiCHIARA: They do, Judge. I think one of them
9 was submitted as far as the hospital reps that was produced in
10 discovery. It doesn't indicate that it is limited to
11 geography. I did submit others that I pulled off of Astellas's
12 website which is identical to the one that was produced in
13 discovery and, again, it is the same job description, it is
14 based on whether it is in Florida or other parts of the country
15 and also based on it is the same based on what type of rep an
16 individual is. And then, going back to the declarations that
17 were submitted by defendant, I believe there were 14 or 15,
18 they all demonstrate that they have the same primary
19 responsibility of calling on doctors or other health care
20 professionals and conveying Astellas-provided information and
21 they are given target lists to call on and that's significant
22 here.

23 In addition Astellas, as the Ann Allison affidavit
24 indicates which was submitted by defendants, provides that all
25 reps regardless of type of rep -- therapeutic area, business

1AE5curA

argument

1 group -- are all classified as exempts.

2 In addition, defendants own incentive compensation,
3 the bonus plan which was submitted with our reply papers, it
4 indicates that the bonuses are the same for all reps, all
5 different types of reps all across the country. And what is
6 interesting about that plan, your Honor, is that, again,
7 Astellas is claiming these are sales people yet they are
8 eligible for incentive compensation at times when they're not
9 in the field selling, even if they're on maternity leave, FMLA
10 leave and, conversely, they're not eligible for incentive
11 compensation if they happen to be on the performance
12 improvement plan even if they're out in the field selling no
13 matter how robust their numbers will be.

14 THE COURT: Does the fact that some sales reps earn
15 over \$100,000 annually weaken your argument?

16 MR. DiCHIARA: It doesn't, Judge, because they would
17 have to fit under the highly compensated exemption and to fit
18 under the highly compensated exemption they would have to
19 qualify for one of the two prongs of the administrative
20 exemption, either they have to do work that is generally
21 related to the general business operations or exercise
22 discretion and independent judgment over matters of
23 significance. Based on the DOL and the Second Circuit's ruling
24 in Novartis, pharmaceutical reps like those here do not
25 exercise discretion in the judgment over matters of

1AE5curA

argument

1 significance. And in the Second Circuit's opinion in Reiseck
2 they also do not have a primary duty of engaging in work
3 directly related to the general business operations of
4 Astellas. And, in fact, there is a Court in the District of
5 Connecticut involving Schering Plough that held just that, that
6 pharmaceutical reps aren't exempt under either prong of the
7 administrative decision.

8 So, we have those rulings here. The prevailing case
9 law in the circuit indicates that they would not be exempt
10 under the highly compensated exemption. Also, along those
11 lines, Judge, the FLSA is a broad, medial statute and the
12 purpose behind it was to encourage employers to hire people.
13 So, if you had two people working 60 hours a week the idea was
14 that they would hire three people to work 40 hours a week.
15 And, again, in today's economic climate where people are --
16 where the unemployment rate is high, again that same broad
17 medial purpose would apply today, that if people are working
18 more than in excess of 40 hours it would encourage employers to
19 hire additional people to cut down on their unemployment rate
20 which is one of the indications or one of the reasons for the
21 passage of the FLSA.

22 And then --

23 THE COURT: What about the defendant's argument that
24 some of the reps sell directly to hospitals? Does that, in any
25 way, weaken your argument?

1AE5curA

argument

1 MR. DiCHIARA: Well, I haven't seen any evidence of
2 reps selling directly to hospitals. The hospital reps of which
3 plaintiff is one, again, they don't talk to health care
4 providers at the hospital and convey information about Astellas
5 products. And eventually there is other people at Astellas
6 that do negotiate the contracts and the prices with those
7 hospitals.

8 So, I haven't seen any evidence of any rep directly
9 entering into a contract, negotiating a price or anything to
10 that nature and in fact, your Honor, what was submitted as
11 Exhibit E in our reply brief which is the exchange concerning
12 the discovery dispute between the parties, if you refer to page
13 9, again, this is defendant's own words, Astellas does not
14 claim, however, that its pharmaceutical sale representatives
15 collect payments, personally enter into contracts, personally
16 take orders, or personally negotiate prices.

17 So, again -- this is defendant's own words in Exhibit
18 E on page 9. So, again, there is no evidence that any reps
19 actually sell directly to hospitals meaning that they engage in
20 an exchange of goods, negotiate prices, take orders or
21 negotiate contracts.

22 And, again, even though at this stage we're not
23 supposed to get into the merits I have sort of touched on the
24 merits briefly. Reps here, it is clear they don't consummate
25 sales, they don't take orders, they don't negotiate contracts,

1AE5curA

argument

1 they don't negotiate prices, they don't take orders and they
2 engage in targeted promotional work which is not exempt
3 administrative work, and discretion and independent judgment
4 over matters of significance, again, I didn't address it in my
5 briefs and we will address that at the appropriate time.

6 Again, that's just focusing on defendant's submissions
7 and defendant's evidence. Now, plaintiff's evidence again just
8 confirms that they're misclassified as exempt, they worked more
9 than 40 hours and weren't paid overtime. It confirms the fact
10 that they don't sell as defined by the DOL and in accordance
11 with the Second Circuit's opinion in Novartis and they don't
12 exercise discretion and independent judgment over matters of
13 significance.

14 Finally, Judge, I just want to bring up the issue of
15 the declarations that were obtained by defendant. Again, there
16 is no indication that those were properly acquired. I know
17 defendant submitted a sur-reply indicating, suggesting that
18 they did obtain those properly. Again, in our mind those raise
19 more questions than answers as far as, you know, the
20 submissions that were set forth in response to --

21 THE COURT: I think I understand your point and, quite
22 frankly from my perspective, that whole issue is a distraction
23 to the motion that's before me. So.

24 MR. DiCHIARA: That's fine, Judge.

25 THE COURT: Let me hear from your adversary. All

1AE5curA

argument

1 right?

2 MR. DiCHIARA: Thank you, your Honor.

3 THE COURT: Thank you, Mr. DiChiara.

4 MR. ROSENBLATT: Good to see you again today, your
5 Honor.

6 THE COURT: Yes.

7 MR. ROSENBLATT: We need to stop meeting like this.

8 I feel like listening to Mr. DiChiara's oral argument
9 which was fine, and his reply brief, our cases are like two
10 ships passing in the night -- although your Honor honed in on
11 one of the cases that has been ignored in the reply brief and
12 ignored in the oral argument and that is this distinction
13 between Novartis-type sales, what I will call CVS sales, the
14 type of prescription that goes and gets filled at the local
15 pharmacy versus what I will call shelf-stocking sales wherein a
16 sales rep goes to the institution and we are going to have some
17 graphic examples of it from the record that apparently he
18 hasn't seen because there is evidence in the record of actual
19 sales to institutions and clinics of products. These are
20 very -- two very different things. And it is not to suggest,
21 your Honor -- all I heard here after having been accused in the
22 briefing that all we did was argue the merits. We're not
23 arguing the merits here today but to your Honor's point there
24 is a difference in the type of sales between somebody who is
25 doing the CVS sale going into a doctor's office and persuading

1AE5curA

argument

1 somebody, persuading their customer or the doctor to write a
2 script that's going to get filled at CVS. We think that that
3 is selling but the point here is that what Mr. Raimundi, the
4 named plaintiff and four out of the five opt-ins did was not
5 script sales. They were doing shelf-stocking sales and we will
6 show you some highlights.

7 One of the opt-ins, Danielle Feeko from Binghamton,
8 was different from the plaintiff and the other opt-ins. She
9 did script selling sales. She sold a urological product to
10 doctors that doctors wrote scripts, they would fill it at the
11 local CVS, her circumstances and the circumstances of many of
12 Astellas's sales reps are different from what you are going to
13 see from the plaintiff and the opt-ins although, frankly, the
14 plaintiff, in our view, is the perfect plaintiff for the
15 defense because he sold a product that was stocked on the
16 shelves, there was no pharmacy intermediary.

17 The other thing that they seem to ignore --

18 THE COURT: Do some sales reps sell directly to
19 hospitals or pharmacies?

20 MR. ROSENBLATT: Well, the distinction that
21 Mr. DiChiara is drawing is that, well, they go and sell to the
22 hospitals and they sell to clinics. There are other people who
23 sell to, for example, wholesalers. Okay? In the record I
24 believe there is evidence in the record that at times doctors
25 actually did purchase directly from Astellas. I think that is

1AE5curA

argument

1 changed now and there is a wholesaler that sells but the actual
2 customer relationship between the Astellas sales rep and his
3 customer -- and they refer to them as their customers, the
4 hospital -- is the doctor, the person who runs the pharmacy so
5 that they will then purchase and stock a product on their
6 shelves. Very, very different from Novartis although we are
7 not arguing summary judgment here, although from listening to
8 plaintiff's oral argument it almost sounds like we are at
9 summary judgment. The point is different than Novartis,
10 amongst the sales representatives that they purport to be part
11 of the putative class here, very different activities depending
12 on what product you sold.

13 I will point out, your Honor, Judge Cooper in the
14 alternative in the Evancho v. Sanofi case, denied certification
15 in a case that Mr. DiChiara and some others were involved in,
16 denied certification because in that case there was evidence in
17 the record as there is evidence here that there was products
18 that were administered, for example directly in office,
19 injectable products or vaccines. The most famous injectable
20 product is probably Botox from Pfizer. Right? The doctors buy
21 that, stock it in their shelves in the office and have their
22 Botox parties and they administer it. So, very, very different
23 than what the record reflects in Novartis and I might add, your
24 Honor, in the Martinez v. Forest Pharmaceutical case where you
25 have reps as I understand it who were selling only primary care

1AE5curA

argument

1 products to doctors in their offices.

2 The other thing that plaintiff's argument and brief
3 ignore, and I'm going to have some examples of it, is that
4 there is a record replete with evidence of dissimilarities
5 between a plaintiff like Raimundi who says he, like the
6 plaintiffs in Novartis, literally were straight-jacketed by
7 their particular manager to comply with regulations.

8 The evidence in the record, that we submitted, is
9 replete with evidence from the plaintiffs, the opt-ins and
10 other people. That's not our circumstance. We weren't
11 micromanaged by our supervisor. We tailored our presentations.
12 And I'm going to highlight some of that but one of the cases
13 that is most interesting to me, your Honor, is Palacios v.
14 Boehringer Ingelheim out of the Southern District of Florida a
15 case that plaintiff cites to you because summary judgment was
16 granted on behalf of Ms. Palacios down there on the findings
17 that she was deemed non-exempt, a pharmaceutical rep case.
18 But, the opinion that plaintiffs don't refer to is the prior
19 one in that case where the Judge there denied 216(b)
20 certification holding, effectively, that although that
21 individual plaintiff might be able to make out her claim, she
22 couldn't stand in the shoes of a putative class because her
23 circumstances were very different than ours, than the class
24 that she purported to represent. And that decision in Palacios
25 is not unusual. And frankly, your Honor, we're not asking you

1AE5curA

argument

1 to do anything novel here because in Palacios, in Silverman v.
2 Smith Kline Beecham out of the Southern District of California,
3 another case in which Mr. DiChiara 216(b) certification,
4 denied. Evancho v. Sanofi, denied.

5 THE COURT: These are obviously outside the Second
6 Circuit and hasn't Second Circuit really said that the
7 threshold is very low at this stage.

8 MR. ROSENBLATT: No, your Honor. What the Circuit
9 said in the Hertz case was consistent with the same standard
10 that was applicable to each of those cases.

11 The Hertz case is the exact same standard as in the
12 Third Circuit where Evancho was denied. It is the same
13 standard in California where the SmithKline case was decided.

14 And, your Honor, the point is it is not a perfunctory
15 standard. What the Hertz case said, it said even if the
16 standard is of modest evidence it must still be based -- and
17 I'm quoting from Hertz -- it must still be based on some
18 substance and not just unsupported allegations and that's what
19 you have here is unsupported allegations. It is not a
20 perfunctory rubber stamp which is what plaintiff, by standing
21 up -- he wants you to say it is a perfunctory standard and I
22 don't have to dig any deeper into it but that's not the
23 standard. He cites the fact that Astellas classifies on a
24 national basis but there are cases, legions of cases saying
25 that's not enough to justify certification. In fact, your

1AE5curA

argument

1 Honor, if that were the standard, every case where there would
2 be -- every misclassification case where there is a challenge
3 to a classification based upon a title like in the Hertz case
4 where station managers were classified on a nationwide basis,
5 same title, same classification, 216(b) certification was
6 denied. And that's the Hertz case that is supposedly the
7 standard. Okay?

8 THE COURT: Hasn't the plaintiff offered other
9 affidavits here and job descriptions in addition to Astellas'
10 common policy?

11 MR. ROSENBLATT: Yes, and I'm going to deal with the
12 affidavits in a second but let me start with the job
13 descriptions, okay? Job descriptions, in and of themselves,
14 are not enough to justify 216(b) certification. Your Honor, in
15 the Anglada v. Linens & Things, a case out of the Southern
16 District of New York, "job descriptions and postings do not
17 evince whether prospective employees are in fact similarly
18 situated. Diaz v. Electronics Boutique; despite a common job
19 description, "highly fact specific and detailed analysis of
20 each employee's duties is required making class treatment
21 inappropriate." In fact, your Honor, if you look at the job
22 description that they're using here, if you look at it, it
23 describes what would be a lawful policy, not an unlawful
24 policy, because if you read that description it shows a
25 position that describes sales and it shows a position that

1AE5curA

argument

1 requires strategy. It is an exempt position and, your Honor,
2 the burden that they carry -- and it is plaintiff's burden,
3 however modest, is to establish that there is a common unlawful
4 policy. And, Joe, if we can take a look at illustration 1 and,
5 your Honor if you can see this? It might be a little
6 difficult. If you refer that I hand you a -- I have copies of
7 it, if you prefer.

8 THE COURT: I will take a copy.

9 MR. ROSENBLATT: I apologize, I thought it would show
10 up better.

11 THE COURT: That's all right.

12 MR. ROSENBLATT: What plaintiff relies upon are cookie
13 cutter boiler plate declarations --

14 THE COURT: Let me just ask, which item are we looking
15 at? No. 1.

16 MR. ROSENBLATT: Yes, tab 1; and we will try to go in
17 sequence.

18 THE COURT: Thank you.

19 MR. ROSENBLATT: And just let me tell you what we have
20 here. We have pulled from the record and we have done some
21 comparative and contrast in illustrative fashion because I know
22 it is hard to capture that just reading a brief, but the first
23 exhibit, first illustration is a comparison between two of the
24 plaintiff declarations. What you see here is paragraph 8 from
25 Ryan Nepomuceno's declaration versus that of opt-in Andrea

1AE5curA

argument

1 Desaro. They're virtually identical. And if you look at all
2 four of the declarations that were submitted, you will see that
3 they are all virtually identical. It is as if, your Honor,
4 they got Mr. Raimundi to verify the complaint and submitted
5 that. And we do know under the Hertz case that mere
6 allegations are not enough. That's what these are. These are
7 mere allegations. This isn't substance.

8 And what the Court said in Silverman v. SmithKline --
9 and it is very particularly relevant here, it is the same
10 playbook that plaintiff used in that case they're using here.
11 Plaintiff presented, "narrow, potentially unrepresentative
12 samples in support of a broad conclusion. The Court strongly
13 disapproves of the use of boiler plate attorney-drafted
14 declarations." That's at 2007 U.S. Lexis 80030 at page 5.
15 That's exactly what's been done here.

16 It is interesting, your Honor, I think you would find
17 it highly interesting that you allowed us to create a discovery
18 record here and we took depositions of plaintiff and every
19 opt-in except for one and there is probably at least 1,000
20 pages of deposition testimony and plaintiff filed two briefs,
21 did not cite a single page of the plaintiff or the opt-ins'
22 deposition testimony. And let's explain why that is.

23 If we can take a look at illustration no. 2, the top
24 call out, your Honor, is paragraph 11 of Mr. Nepomuceno's
25 declaration. He says that he was provided this list of doctors

1AE5curA

argument

1 and was instructed how many times he had to visit the doctors.

2 Well, I deposed Mr. Nepomuceno and starting at page
3 122, line 24 of his deposition transcript I asked him:

4 "Q Did they" -- in reference to Astellas -- "tell you the
5 particular surgeons to call on?

6 "A No.

7 "Q And the surgeons were not on your list, right?

8 "A No."

9 And then you can read for yourself, your Honor, I
10 said:

11 "Q How did you find out who they were?

12 "A By going to the hospital."

13 That's very different than the conclusionary
14 allegation in the boilerplate employer created declaration that
15 he signed.

16 If we turn to the issue of outside sales you will see
17 that there is a mantra throughout the declarations and if we
18 look at illustration No. 3 Plaintiff Raimundi, and I believe
19 every one of the declarants for the plaintiff said I acted as
20 an educator of physicians for Astellas. My goal was just to
21 keep Astellas products in the minds of doctors. They're trying
22 to suggest to your Honor that they're not really like sales
23 persons, they don't have the indicia of sales. If you
24 remember, your Honor, from the New York Life litigation about
25 the indicia of sales, we got very deeply into that.

1AE5curA

argument

1 Now, if you take a look at the callout below that,
2 Danielle Feeko, who is an opt-in participating in this case, I
3 asked her at her deposition, and this starting at page 49, line
4 25:

5 "Q And so, am I correct that in performing your job
6 responsibility your objective was to persuade doctors to write
7 prescriptions?"

8 She asked me to repeat and she asked me to define how
9 to persuade -- what I mean by persuade doctors. The final
10 question:

11 "Q Get them to write prescriptions for Vesicare.

12 "A Yes."

13 She wasn't describing herself as a mere educator. And
14 I'm not suggesting, your Honor, that Mr. Raimundi or the other
15 declarants weren't telling anything other than the truth. They
16 may have viewed their jobs as mere education. They may have
17 had managers who said just go out and educate. But, that's not
18 what their fellow opt-in Danielle Feeko said.

19 If you turn to illustration no. 4, your Honor --

20 THE COURT: Let me ask that in the end, aren't all the
21 reps responsible for meeting with physicians, distributing
22 marketing materials that somebody has reviewed, organizing
23 calls and getting commitments to purchase Astellas's products?

24 MR. ROSENBLATT: Your Honor, what I would say is in
25 every misclassification case there are going to be certain

1AE5curA

argument

1 common attributes but that doesn't resolve the issue as to
2 whether the particular individual plaintiff or opt-ins should
3 stand in the shoes and represent a class of more than a
4 thousand people around the country. The same could have been
5 said for the four cases where certification was denied. In the
6 Palacios v. Boehringer Ingelheim case, which relied upon
7 Novartis to grant summary judgment, that Judge said 216(b)
8 doesn't apply.

9 If you look at the Hertz case, your Honor, if you read
10 the case about the station managers there, you bet every one of
11 those station managers, all throughout the country, would have
12 certain things that they do in common including have the same
13 job title but that doesn't resolve the issue as to whether
14 they're so similarly situated as to be able to represent
15 everybody else who happens to have the same job title.

16 In fact, your Honor --

17 THE COURT: But can't you challenge those things at a
18 later time after preliminary certification?

19 MR. ROSENBLATT: Sure I can, your Honor, but you
20 allowed us to create a record. This is not a case like some of
21 the cases that plaintiff cited where they're at a very, very
22 early stage with a barren record. It is not as if we -- I
23 didn't want to repeat my brief, but in our brief we pointed out
24 that this is not some inconsequential exercise to send out a
25 notice to all of your current employees and many of your former

1AE5curA

argument

1 employees and say you can go sue your employer. This is
2 something, your decision has consequences, your Honor, and you
3 need to be cognizant of those consequences because that is,
4 first of all it is a labor-intensive task but it is also
5 something that puts us in a bad spot with our employees. And
6 so, that is not -- the fact that we could try to undo it later
7 and perhaps send out a notice and say, okay, my bad, they
8 shouldn't have certified in the first place; that creates
9 confusion on the part of these absent class members as well.
10 You allowed us to create a record, we created that record, we
11 would ask that you consider that record in determining whether
12 the plaintiff has carried his burden. This isn't our burden to
13 disprove, it is their burden.

14 And, your Honor, on the issue of -- I will skip over
15 it to move things along, I know you have other business today,
16 but on the issue of what their job responsibilities are, that
17 doesn't begin to address the issue of discretion and judgment
18 of which there is wide variety of stories being told here.

19 Your Honor, we have already made the point but before
20 I get to the administrative exemption --

21 THE COURT: If their responsibilities differ so widely
22 why does Astellas uniformly classify them as exempt?

23 MR. ROSENBLATT: I said that certainly the discretion
24 in judgment that they purport to have differs widely. You know
25 the ultimate goal is to sell product, okay? So they have these

1AE5curA

argument

1 common attributes and note, just like most employers with the
2 nationwide sales force or nationwide job -- a company with
3 nationwide people doing things that are similar in nature, they
4 have a common total. And it is very common to use a common job
5 description. I have cited to you some cases and there is more
6 in the brief, that is by no means sufficient basis to conclude
7 that there is similarly situatedness for the purpose of 216(b).
8 Again, I go back to the Hertz case. That could apply there as
9 well, your Honor, and 216(b) certification could have applied
10 in the Amendola v. BMS case right here -- Amendola v. Bristol
11 Myers Squibb, Judge Cote.

12 THE COURT: A pharma rep case.

13 MR. ROSENBLATT: I know we are pressed for time so I
14 will try to accelerate but I will try to slow down.

15 Your Honor, just to capture the point on the
16 distinction of the type of products that people sell, just for
17 the record we have a product called Adenoscan, a product called
18 Lexiscan; those are stress agents that are sold to doctor's
19 offices, clinics, to use in stress tests not filled at a
20 pharmacy and a number of other products: Mycamine, Vibativ,
21 Vaprisol, Amevive, all are products that are shelf-stocking
22 products.

23 But I want to cut to the chase on the administrative
24 exemption, your Honor. We have provided 14 declarations that
25 are not boilerplate declarations, they describe a variety of

1AE5curA

argument

1 different ways that people do their business. They describe a
2 variety of different relationships with supervision with their
3 supervisors where some of the plaintiffs and opt-ins claim they
4 were micromanaged. The other declarants say quite unlike those
5 other opt-ins and quite unlike Novartis we were not
6 straight-jacketed at all.

7 But even if you were not to look at those
8 declarations, your Honor, you look at the plaintiffs' evidence
9 or evidence that we garnered from the plaintiffs, put aside
10 their declarations, you will see, one, that the evidence that
11 they presented is not competent to speak for others. What
12 they've tried to do, and this is a typical play in these pharma
13 rep cases, is to get the small group of people that they have
14 to say that they have the ability to speak for everybody else
15 and occasionally a Court will say that's good enough for me.
16 There is plenty of other Courts that have said you are not
17 competent to speak for, and New York can't speak for somebody
18 in New Jersey or even somebody in California. And let's
19 explain why.

20 Joe, can you bring up illustration 6 or just turn to
21 illustration 6 at this point? We will see in this example of
22 why the plaintiff's evidence is incompetent to reflect the
23 situations of others.

24 Plaintiff Desaro testified that her goal, as with
25 every other plaintiff, was to educate, not to sell. And then

1AE5curA

argument

1 she concludes by saying based upon my observations and
2 interactions with other reps, I believe this was the same for
3 all reps.

4 Now, your Honor, if you turn to her deposition
5 testimony, before she had the benefit of having someone write a
6 declaration for her she had to testify under oath and I asked
7 her a question that related to whether any of her colleagues at
8 Astellas asked any doctors to switch from a competitor's
9 product to an Astellas product and her answer, I wish I had the
10 video here, somewhat flippant, was no clue. I don't work with
11 those people. I'm not in their bodies. And, witness after
12 witness testified that they only knew their own circumstances,
13 your Honor.

14 Another example why they don't cite their deposition
15 testimony, they cite their declarations. Another example of
16 that is illustration no. 7, your Honor. There is a
17 particularly important one, this is Ms. Desaro again, in the
18 callout from paragraph 11 of her declaration she says:
19 Defendants instructed me on what products I should talk to the
20 physicians about, what message or information to provide to the
21 doctors and the order that I should present. The message,
22 again, theme being I had a straightjacket like the Novartis
23 people.

24 Now, in her deposition testimony on page 229 starting
25 at line 13 she said, in answer to a question: It is hard to

1AE5curA

argument

1 maintain a standard formula when each situation is very
2 different and it doesn't mean anything anyway.

3 I followed up and said:

4 "Q So, the question, the approach to use in each sales call
5 will vary based on the circumstances of the sales call?

6 "A Yeah. That's what I said."

7 Something like that tone, your Honor. So, the
8 declarations and the testimony don't line up and it doesn't
9 line up when you look at the issue of supervision. So, if you
10 look at illustration no. 8, your Honor Plaintiff Raimundi, who
11 is our first deponent when we created this record in the
12 callout from his deposition testimony starting, it is on page
13 66, line 13, was testifying about his claim that at times his
14 manager demanded that he script out questions that he was going
15 to ask doctors and get the manager's approval to ask those
16 questions of his customers the doctors. That was
17 Mr. Raimundi's story. The callout below is from
18 Mr. Nepomuceno's deposition also page 66, line 13 of his
19 coincidentally, actually:

20 "Q Did you ever prepare written questions that you were going
21 to use?

22 "A No.

23 "Q And you never provided written questions to Buffy for her
24 approval?"

25 Buffy was his manager. And the answer was

1AE5curA

argument

1 "A No."

2 And I will tell you that I asked that same question to
3 every one of the deponents and each one of them acknowledged
4 that they were very different than Mr. Raimundi. I'm not
5 suggesting that Mr. Raimundi isn't telling the truth. That may
6 have been his circumstance but it's not similar to the
7 circumstance of the people -- of other opt-ins and is certainly
8 not similar to the circumstance of absent class members. And I
9 will wrap up with a few quick illustrations, your Honor, to
10 bear that point out.

11 If you look at illustration no. 9, again, this is from
12 Raimundi, your named plaintiff's declaration, he says every
13 piece of printed or written material that I utilized or
14 provided to doctors was pre-approved and supplied by Astellas
15 and I was also trained on how to present these materials and
16 given scripted messages about the Astellas product. That
17 declaration is intended to tell you, your Honor, that I'm
18 scripted, I'm like the Novartis people even though the fact I'm
19 selling other products that are bought at clinics that I'm like
20 the Novartis people with a straightjacket around me.

21 If you look at the callout from illustration no. 9,
22 paragraph 7 is from the declaration of Todd Black, one of the
23 non-opt ins that plaintiffs purport to want to represent. He
24 starts off by saying: I also tailor my sales calls based upon
25 the customer's individual interests. And he goes on to

1AE5curA

argument

1 describe how he, in detail, not like cookie cutter boilerplate
2 stuff, he describes in detail how he tailored his sales calls.
3 He says at the end while Astellas provides me with a variety of
4 sales aids that I can use during my calls, it is up to me to
5 learn where each customer's interest lies and then present and
6 discuss particular sales aids to appropriately address those
7 interests.

8 That's someone who is making judgments, that's
9 somebody who is developing strategy, that's someone who is
10 running a business, running a territory. That's not the
11 cookie -- that's not the straight jacketed sales rep in
12 Novartis, that's not Mr. Raimundi your named plaintiff. A very
13 different set of circumstances if we accept both of them as
14 true as I'm prepared to do.

15 Then, your Honor, if you look at no. 10, Mr. Raimundi
16 saying, again, he is stuck with the list that Astellas
17 provides, that's paragraph 12 of his declaration and he says
18 he's told how many times to call on his customers. Declarant
19 Donald Drake attested that the frequency goal refers to a
20 suggested minimum number of times a representative calls on a
21 provider in each court. And you will see at the end of the
22 call, I will short circuit it, I do not need to seek approval
23 from my regional sales manager to make any of these changes.
24 Maybe Mr. Raimundi was micromanaged, I don't know, but that's
25 not something he can say for everybody else.

1AE5curA

argument

1 Finally, your Honor, illustration 11, this is again
2 Mr. Raimundi's declaration, strictly controlled by Astellas is
3 what he says. This is an excerpt from Danielle Feeko, again an
4 opt-in who filed a consent form in this case and you will
5 notice, your Honor, there is no declaration submitted from
6 Danielle Feeko submitted in this case because she couldn't
7 possibly justify or reconcile a declaration that's akin to the
8 boilerplate we have seen with her testimony.

9 I asked her:

10 "Q You developed a strategy for the particular sales call,
11 right?

12 "A Yes. So she's acknowledging that she's not scripted, she's
13 developing a strategy."

14 And if you go on she talks a little bit further, I
15 say:

16 "Q And so, you'd have that strategy and am I fairly safe to
17 say probably nine times out of ten you'd show up at a doctor's
18 office and, you know, you'd have to change directions and do
19 something different?

20 "A All the time."

21 That's in the a script, your Honor. That's different
22 than Raimundi. Feeko in Binghamton, Raimundi here in
23 Manhattan; different circumstances, different managers,
24 different behaviors. The dissimilarities, your Honor, abound.
25 You have identified in your first question to Mr. DiChiara the

1AE5curA

argument

1 fact that people are selling a product, in fact your Honor just
2 to highlight that point, if we can go back to no. 5, Joe, this
3 one captures your question to Mr. DiChiara and his answer that
4 he's not aware of any direct sales. Paragraph 21 is this
5 theme -- paragraph 21 of Mr. Raimundi's declaration is the
6 theme of plaintiffs that they don't transfer title therefore
7 they can't sell.

8 Now, if we look at the testimony of Mr. Raimundi and
9 his deposition is replete with examples like this, I'm asking
10 him about what he did to convert Bronx Bridge Nuclear which is
11 a clinic that does stress tests; convert meaning that switching
12 from a competitor's product to Astellas. Sounds like sales to
13 me, your Honor. And here's his answer: They were, in
14 reference to Bronx Bridge Nuclear, they were Adenoscan
15 customers. They purchased Adenoscan from us and they were a
16 target for Lexiscan as well. Lexiscan was the next generation.

17 That sure sounds like selling, your Honor. They
18 purchased from Astellas. That's what people were thinking --
19 that's what Raimundi thought when he was doing his job.

20 And so, I conclude and I summed up for him:
21 "Q So you were trying to get Bronx Bridge Nuclear to buy
22 Lexiscan, right?

23 "A Correct."

24 Hard to reconcile with his claim that he is a mere
25 educator. It is certainly hard to reconcile with the facts in

1AE5curA

argument

1 Novartis and Martinez v. Forest Pharmaceuticals.

2 So, the dissimilarities abound with regard to sales
3 and the products that people sold, whether they're educators or
4 salespeople, whether they were heavily supervised by district
5 managers or not, whether they had flexibility during sales
6 calls, whether they used scripted questions or not. In our
7 papers we laid out song and verse. We cataloged those types of
8 dissimilarities for your Honor and we hoped what we wanted to
9 do here was try to capture some key points to draw it out for
10 you.

11 Your Honor, you have discretion here to deny
12 certification. You have discretion to look at whether the
13 plaintiff carried his burden of proving that he is so similarly
14 situated in a work force that is across an entire nation that
15 notice should go to all of our employees and that he could be
16 their representative.

17 If we bring up illustration 12, this one you can
18 probably see a little better although the map in your book
19 highlights what we are trying to point out. Illustration 12
20 shows that you have got four declarants on behalf of plaintiff
21 and if you see, two of them are in Jersey and two of them are
22 in New York, basically on both sides of the George Washington
23 bridge. And what is interesting is you see the name Frank
24 Curcio between the two upper red boxes, your Honor? Frank
25 Curcio is a declarant for whom we submitted a declaration who

1AE5curA

argument

1 said: *I'm a sales guy. I have discretion and judgment.* And,
2 guess what? Mr. Curcio reported to the same manager as
3 Mr. Raimundi. And Mr. Raimundi wants to say he can represent
4 the circumstances of Mr. Curcio.

5 But you look at this map, your Honor, you've got
6 people in basically, I don't know, maybe a 10 mile radius, you
7 have four of them purporting to represent a class that is
8 nationwide and we have presented to you declarations from all
9 over the country of people who are saying they're very
10 different than Raimundi.

11 And, your Honor, not only does the record that's been
12 created -- they directed and authorized us to create -- stand
13 in the way of a conclusion that these folks are similarly
14 situated, I would suggest to you that it would be unfair in
15 this case to certify a collective action and if we can go back
16 to the very beginning of this case let's discuss why that is.

17 If your Honor will recall, we initially filed a
18 pre-motion letter seeking to either dismiss this case or
19 transfer it back to New Jersey because the original name on the
20 caption of this case was Pamela Curley. And if your Honor will
21 recall, Pamela Curley was employed by Astellas in New Jersey
22 and she had sued Astellas in New Jersey represented by
23 Mr. DiChiara bringing claims under New Jersey employment law.
24 By definition, therefore, she must have considered herself, at
25 least in some measure, a New Jersey employee if she was trying

1AE5curA

argument

1 to avail herself of New Jersey employment law.

2 We said to your Honor this case either should be
3 dismissed or transferred over to New Jersey, and if it had been
4 transferred over to New Jersey we would be governed by Third
5 Circuit law, Smith v. Johnson & Johnson, which held that the
6 sales representatives of Johnson & Johnson were exempt
7 ex-employees.

8 So, plaintiff didn't want to get stuck in New Jersey
9 so Ms. Curley got dropped like a hot potato because the
10 plaintiff's counsel was fortunate enough to find a sales
11 representative who happened to live in New York and that's
12 Jesus Raimundi. And by virtue of that happenstance he now
13 wants to send out a notice and have a nationwide collective
14 action governed by Second Circuit law because he loves
15 Novartis. Even though, as I have said, Novartis is
16 distinguishable from the facts of our case, who wouldn't want
17 to be in the Second Circuit where you have got Novartis? He
18 certainly doesn't want to be in the Third Circuit. He
19 certainly doesn't want to be where Dave Anderson of California
20 is.

21 THE COURT: Isn't that sort of just a fact of life
22 because we have different circuits?

23 MR. ROSENBLATT: No, your Honor. It doesn't have to
24 be a fact of life, okay, because, your Honor, you have
25 discretion. We have a circumstance here of a federal law

1AE5curA

argument

1 that's supposed to be uniform. Okay? And you've got circuit
2 courts that have conflicting conclusions here.

3 THE COURT: But the Second Circuit grades my papers.

4 MR. ROSENBLATT: Understood, but we're not asking you
5 to decide the merits here, your Honor. You have discretion to
6 decide whether it's appropriate and fair to certify this case
7 here in the Southern District of New York. And, as I said in
8 the Palacios case, you had a judge there that thought Novartis
9 was spot on -- we disagree -- but held that it was spot on and
10 granted summary judgment for an individual plaintiff saying you
11 were misclassified as non-exempt. But, I'm not availing your
12 claim to represent that of everybody else. It simply is unfair
13 to Astellas, with a nationwide workforce, in a situation where
14 you are supposed to have a body of uniform law to say that all
15 of its employees are going to be governed by right now is a
16 single decision out of one court holding that the plaintiffs in
17 Novartis were not exempt. You don't need to tell Astellas that
18 you basically have to reclassify everybody because he happened
19 to find a single plaintiff in New York that he could substitute
20 conveniently in for the New Jersey-based plaintiff. You don't
21 have to do it, it would be unfair, but you don't even need to
22 reach the fairness issue, your Honor. Even though it wasn't
23 our burden of proving a lap of similar situatedness plaintiff's
24 burden to prove similarly situatedness, the record that we have
25 presented, some of which we highlighted here but all of which

1AE5curA

argument

1 is obtained and attached to our opposition papers establishes
2 not only has the plaintiff failed to establish similarly
3 situatedness, but the record that you directed and allowed us
4 to create is that they aren't similarly situated. They're not
5 similar to Novartis. The opt-ins of the plaintiff are not
6 similarly situated amongst themselves and they're similarly not
7 situated to the people who are peppered around the country who
8 have very different stories, very different circumstances than
9 Mr. Raimundi.

10 THE COURT: I think I understand your arguments.
11 Thank you, counsel.

12 Mr. DiChiara, do you want to be heard further?

13 MR. DiCHIARA: Yes. Just a few points.

14 THE COURT: All right.

15 MR. DiCHIARA: Your Honor, is it okay if I stand here
16 or would you prefer the podium?

17 THE COURT: I would prefer the podium.

18 MR. DiCHIARA: That's fine.

19 Judge, for being criticized for making some
20 merits-based arguments I heard a lot of merits-based arguments
21 from defendants but, again, I still did not see or hear
22 anything indicating that these plaintiffs sell anything.
23 Again, it's probably a gross distortion of the record, citing
24 to Exhibit 5 from Mr. Raimundi, where he is saying that they
25 purchased the Adenoscan from us when even Mr. Rosenblatt

1AE5curA

argument

1 indicated that that was Astellas, not him. Again, there is
2 nothing indicating, again, as Novartis set forth as far as what
3 the standard is for making sales, again, there is nothing in
4 the record from these plaintiffs that they sold anything,
5 negotiated contracts, took orders, signed anything, engaged in
6 any exchange of goods. And, again, there is some reference to
7 a case in New Jersey about injectables and vaccines. There is
8 no injectables or vaccines at issue here, Judge.

9 Again, the whole purpose of 216(b) is there is the
10 modest factual showing, which plaintiff has more than
11 satisfied. Again, if the defendants believe that there is a
12 difference, they have the opportunity to decertify the class.

13 THE COURT: Your affidavits are from New York
14 metropolitan area employees. How do you know that the job of
15 sales representative doesn't differ in other states?

16 MR. DiCHIARA: I know that for a number of reasons,
17 Judge. I know that from job descriptions that have been
18 submitted by defendant. I know it from the declarations
19 submitted by defendants from all parts of the country as you
20 can see on the exhibit that's on the screen there.

21 Again, the defendant gets into some minutia as to
22 whether they were micromanaged or not. It doesn't matter.
23 Their core responsibility was the same, was to call on
24 physicians or health care providers and provide information
25 about Astellas products. That's how I know it. Defendant

1AE5curA

argument

1 provided that evidence in the form of job descriptions and in
2 the declarations they submitted.

3 Again, if you look at the declarations they're
4 basically the same. They may have, you know, phrases that
5 might be slightly different but, again, they're describing the
6 same thing calling on doctors, providing information, doing
7 some planning, undergoing training, everything that every
8 single rep at Astellas does. So, again, that satisfies that
9 they're similarly situated.

10 Again, there is some reference to the Amendola case
11 which has been not followed by any other Court in this Circuit,
12 in fact it is being criticized as applying a Rule 23 standard
13 and getting to the merits. Again, if defendants really believe
14 there is a distinction between these reps, they can do that at
15 a later point when there is summary judgment or move to
16 decertify the class. At this point the plaintiffs have more
17 than satisfied the modest factual showing that that is required
18 at this stage.

19 THE COURT: Counsel, thank you for your arguments.

20 Decision reserved.

21 The Court appreciates the briefs that were submitted
22 in this case on the motion. They were thoughtful and readable.

23 MR. ROSENBLATT: I was worried after the first
24 argument I heard.

25 THE COURT: Have a great weekend.

oOo